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Supreme Court

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United States

OCTOBER TERM, 1978

NO. 78-228

FLORIDA EAST COAST PROPERTIES, INC.,
Petitioner,

v.

METROPOLITAN DADE COUNTY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ABBREVIATION GUIDE

In this Petition the following observations will be used:

A Appendix to Petition for Writ of Certiorari

JDA Joint Deferred Appendix in the United States Court of Appeals, Fifth Circuit[1]

[1]The Joint Deferred Appendix consists of four volumes. The table of contents, which contains a detailed explanatory note concerning the contents of the Joint Deferred Appendix, is located at pages i-iii of the Joint Deferred Appendix.

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METROPOLITAN DADE COUNTY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Florida East Coast Properties, Inc., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above case on May 12, 1978.

OPINIONS BELOW

The opinion of the District Court has not been published. The decision of the United States Court of Appeals, Fifth Circuit (A. 7) has not as yet been officially reported.

JURISDICTION

The judgment of the Court of Appeal for the Fifth Circuit was made and entered on May 12, 1978, and a copy thereof is appended to this petition in the Appendix at pp. 7. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Does the erection of a jail work-release facility by Respondent County in disregard of its own zoning ordinance in a residential area in close proximity to land owned by Petitioner, resulting in (a) severe diminution of property value to Petitioner, (b) thwarting the contemplated use of the property, (c) a crossing of the property by escapees from the facility, (d) police cars and prisoners clearly visible from Petitioner's property, and (e) a generation of fear from the presence of the jail work-release facility in such close proximity to the property owned by the Petitioner:

(1) constitute an effect on the property of the Petitioner amounting to a taking in the constitutional sense?

(2) deprive the Petitioner of its property in violation of its rights under the Fifth and Fourteenth Amendments?

(3) constitute unlawful erection of the jail work-release facility, where the Respondent County failed to take any action regarding a change or exception to the zoning classification when this exception is required by the County's own zoning ordinance?

(4) result in the disturbance of the use of enjoyment of Petitioner's property so as to constitute a nuisance in fact?

(5) constitute a nuisance per se?

(6) cause the Petitioner to be taxed more heavily than other property owners, thereby violating Petitioner's constitutional right to equal protection of the law?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the equal protection, due process, and just compensation for property clauses of the Fifth Amendment to the United States Constitution and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

STATEMENT

The Petitioner, Florida East Coast Properties, Inc., which was the Plaintiff in the trial court, the United States District Court for the Southern District of Florida, filed an action in three counts against the Respondent, Metropolitan Dade County. The Complaint sought damages in excess of Ten Thousand Dollars ($10,000.00), costs and such other relief that the court would deem proper, as a result of the Respondent County having wrongfully erected a jail and work-release facility in close proximity to the Petitioner's property. The facility was erected without regard to the Respondent County's own zoning ordinances. The Complaint asserts that there has been an unconstitutional taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution without compensation and without due process (Count I); that the Plaintiff/Petitioner has been deprived of the use of its land and was, therefore, forced to sustain a property and tax burden not equally shared by others — in violation of the equal protection and due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States (Count II); and that because the Defendant/Respondent improperly erected a jail and work-release facility on property not zoned for such a facility adjacent to property owned by the Plaintiff/Petitioner, there resulted a disturbance, annoyance and interruption in the use, possession and enjoyment of the property, so as to constitute a nuisance resulting in considerable loss and damage to the Plaintiff/Petitioner (Count III). (JDA Vol. I 5-12).

The District Court, after sitting without a jury at an evidentiary hearing on January 29-30 and on February 2, 1976, entered its Findings of Fact and Conclusions of Law

(A. 2; JDA Vol. I 30-32) and its Final Judgment (A. 6; JDA Vol. I 29) against the Plaintiff/Petitioner. In its Findings of Fact and Conclusions of Law, the District Court found that there was no effect on the property of the Plaintiff amounting to a taking in a constitutional sense, concluding that the Plaintiff/Petitioner had not been deprived of its property in violation of the Fifth and Fourteenth Amendments under that claim or on any other basis. It further found that there was no nuisance in fact and that a jail and work-release facility could not constitute a nuisance per se. No mention was made by the District Court in the Findings of Fact and Conclusions of Law of the zoning ordinances of the Defendant/Respondent or of the Defendant/Respondent's failure to comply with their requirements (A. 2; JDA Vol. I 30-32).

The judgment of the District Court was both contrary to established law and inequitable. It was contrary to established law, because the court found, in spite of the uncontroverted facts, that there was no taking whatsoever in the constitutional sense. It was inequitable to the Petitioner since it was the Petitioner alone who suffered the severe effect of the erection this jail work-release facility in absolute disregard of the County's own zoning ordinances. The District Court ignored the fact that by disobeying its own laws the County had wrongfully erected this jail and work-release facility in such close proximity to the land owned by Petitioner as to absolutely thwart the use the Petitioner sought to employ of this property.

The Plaintiff/Petitioner appealed the Final Judgment in the United States Court of Appeal, Fifth Circuit. On May 12, 1978, the Circuit Court affirmed the District Court. (A. 7).

At the outset of its opinion the Fifth Circuit declared the impossible when it stated:

> We eschew any attempt to explore the esoteric question: can there be a taking without a touching? Rather, our review is confined to a narrow survey of the precise conclusion of the trial court that, on the evidence before it, there had been no taking in the constitutional sense.
>
> (A. 13).

In affirming the conclusion of the trial court that on the evidence before it there had been no taking in the constitutional sense, the Circuit Court necessarily *did* consider the question "Can there be a taking without a touching?" And the Court necessarily found, in derogation of established law and in opposition to the direction the law consistently has been progressing, there cannot be a taking without a touching.

A summary of the evidence presented is necessary prior to the consideration of this departure from established law. The Petitioner, Florida East Coast Properties, Inc., (hereinafter "FECP"), is a corporate landowner which was formed for the purpose of acquiring, selling and developing real property. (JDA Vol. III 22). It owns some thirty-six acres of land located in Metropolitan Dade County, Florida, which it purchased in early 1973 for investment purposes. This land was and remains zoned as a multiple family residential area. The northern boundary of FECP's land is adjacent to a lake, on the other side of which is located a parcel of land legally controlled by Defendant/Respondent Metropolitan Dade County, (hereinafter "County"), a political subdivision of the State

of Florida. The County's land includes a peninsular projecting into a lake around which FECP owns the property. The County property is contiguous to FECP's property at one point and is separated by as little as two hundred and fifty feet of water at another. On the other side of FECP's property is a canal; consequently the property purchased for investment by FECP has water frontage on each side of it. (JDA Vol. I 33-46).

Not only is the land owned by FECP zoned RU-4 multiple family residential area, but that property immediately south of FECP's property is likewise zoned for residential use and was being so used. The County's property, however, is zoned GU interim use. Under the zoning ordinances of the Respondent Metropolitan Dade County, only those facilities provided for in the ordinance itself could be erected in the GU interim use area. Further, this "Interim Use" area, under the ordinance, could only be developed in a manner compatible with its surrounding area. The surrounding area is residential in nature. If an exception were to be made to the use outlined in the zoning ordinance, the ordinance outlined certain procedures required to be taken to secure permission to erect a facility not provided for in the "Interim Use" ordinance. No jail or work-release facility was provided for in this "Interim Use" ordinance. (JDA Vol. I 17-20).

In late 1973 without following these requirements of the "Interim Use" ordinance the County began construction of a jail and work-release facility (later called the North Dade Detention and Treatment Center) on the peninsular projecting into the lake around which FECP's property was located. (JDA Vol. I 17-19). Prior to purchasing its property, FECP had made investigations into the zoning ordinances concerning that property and

the surrounding properties. (JDA Vol. III 28). Preparations were then immediately made for the development of FECP's property. A road was installed (JDA Vol. III 26-27, 31), portions of the land were filled; water and sewer lines were installed; plans were drawn and a model building was erected. (JDA Vol. III 44-45).

When it was learned of the intention of the County to erect a jail facility in such close proximity to its property — without securing the required zoning exception — FECP took steps in an effort to stop the plans and then to halt construction. Appearances were made before the County commission. (JDA Vol. III 37). Arguments were presented against the erection of the jail and work-release facility at its planned location. In addition, FECP offered to purchase six alternate sites on which the County could erect its desired facility. All of the proposed sites were rejected. (JDA Vol. III 40). In a further effort to prevent the erection of the jail and work-release facility in the "Interim Use" area, an action was instituted to enjoin this construction as being contrary to the zoning classification of the County's property. A temporary injunction was issued on June 25, 1973, by a state trial court, halting further progress toward the developing, placing or erection of the jail and work-release facility. An appeal was taken by the County.

In the meantime, FECP, having invested in the marketability of its property, began making efforts to sell it. But for the erection of this jail and work-release facility in such close proximity to its land, FECP would have sold the property at a considerable profit. (JDA Vol. III 49). A purchase and sale agreement was entered into at a total sale price of $8,200,000 including some improvements. (JDA Vol. III 65); (JDA Vol. I 47-73); (JDA Vol. III 45-

50). An offer was received in the amount of $7,000,000. (JDA Vol. III 63); (JDA Vol. III 54-55). FECP's purchase price for the property originally had been only $2,425,000. (JDA Vol. III 65). Both of these profitable deals fell through due to the County's erection of the jail and work-release facility in such close proximity to the land of the Plaintiff in violation of the zoning requirements. (JDA Vol. III 49); (JDA Vol. IV 376); (JDA Vol. I 47-73).

During this period the Third District Court of Appeal of Florida reversed the lower court (*Metropolitan Dade County v. Parkway Tower Condominium Association*, 281 So.2d 68 (3d DCA 1973)) with directions to discharge the previously issued injunction, and progress on the location and erection of the facility on that site was resumed. The Florida Supreme Court granted certiorari, heard oral argument and considered briefs on the propriety of the injunction, but later discharged the writ, finding no conflict. In discharging the writ the Supreme Court of Florida did issue a prospective ruling requiring the compliance of municipalities with zoning ordinances. *Parkway Towers Condominium Assoc. v. Metropolitan Dade County*, 295 So.2d 295 (Fla. 1974).[1] (JDA Vol. I 18-19).

This jail and work-release facility, which has no fence around it, began its operation in September, 1974, and has constantly been in operation since then. (JDA Vol. I 19) Housed in this facility are prisoners charged with various crimes from murder on down. (JDA Vol. III 107-108). Roughly 12,000 prisoners per year pass through the

[1]The Respondent County's refusal to follow its own zoning ordinance is an important uncontroverted fact which both the District Court and the Circuit Court refused to consider or to take into account.

facility. (JDA Vol. III 111). From September, 1974, until the time of trial in January, 1976, there were sixteen escapes from the facility, at least one of which is known to have been across FECP's land. (JDA Vol. III, 116, 119); (JDA Vol. I 174-187).

Ever since it became known that the County was erecting this jail and work-release facility in such close proximity to its land, FECP has been unable to market the property. (JDA Vol. III 58-59).

The uncontroverted testimony presented at trial by FECP through its expert witnesses established the following. An imminently qualified psychologist with much experience in the criminal field testified that people are fearful of jails of any nature and that fear generates a serious apprehension on the part of an individual to live in a residence that is close to a jail. (JDA Vol. III 150). An expert witness in the appraisal field testified that, even taking into account the subsequent economic conditions, the present market value of FECP's property had been diminished by $1,065,300.00 as a result of the location of the jail and work-release facility in such close proximity to FECP's land. (JDA Vol. III 222-223); (JDA Vol. I 101-135). A second appraiser testified that the impact of the erection of the jail and work-release facility by the County in such close proximity to FECP's land was to lower the value of FECP's land $1,335,000.00 (JDA Vol. III 299-300); (JDA Vol. I 136-173). As to the marketability of the property, two expert mortgage bankers, one a long term lender and one in the short term construction loan business, testified that, because of the location of the jail and work-release facility so close to FECP's land, the land could not be developed due to the virtual impossibility to secure financing. (JDA Vol. III 176-191, 280-292).

This negative impact on FECP's property was confirmed by the County when it *admitted* that the value of FECP's property had been diminished as a result of the close proximity of this jail. The taxes on the subject property were lowered on the basis of the jail having diminished the value of FECP's land. (JDA Vol. I 74-82); (JDA Vol. III 89-98).

The diminution in the value of FECP's property as a result of the location of the jail so close to the subject property was further admitted by the commissioners of Dade County when they upheld the reduction of the land value on that basis. (JDA Vol. I 83-89).

This is a case of placing a right thing in a wrong place. Under the old common law English tradition a sovereign could do no wrong. That theory arose out of the situation in England where the sovereign and the people were distinct and separate entities. Today, that is not the case. In the United States and in Dade County, Florida, the people are the sovereigns. They are one and the same; the County is only a representative of the people. Today, under these principles, the County should not be allowed, in disregard of its own laws, to place an inequitable burden on one citizen and taxpayer not shared by the rest of the landowners, or to wrong this landowner by causing its property to become virtually useless and by causing an extreme diminution in its value, thereby, without legal process, thwarting the use of the property. Such action constitutes an unconstitutional taking and a nuisance. The County, the sovereign, *has done wrong* in this case. The wrong has been done to the Petitioner/Plaintiff, Florida East Coast Properties; and the District Court and the Circuit Court departed from established law when it held there had been no taking in the constitutional sense.

In the initial portion of its opinion the Circuit Court observed a distinction between "damage and taking", asserting that such a distinction must be observed in applying constitutional provisions. The Court went on to assert that it is the "character of the invasion," not the amount of damage which results from it which determines the question of whether or not there has been taking. It was here that the Circuit Court began to and continued to depart from the established law that it is the *effect* of the conduct of the municipality on the complaining landowner's use of the property which is the prime determining factor as to whether or not there has been an unconstitutional taking.

A long line of cases can be explored which establish that no physical invasion need be demonstrated to establish an unconstitutional taking has occurred. The effect of the County's acts upon FECP's property amounts to a physical invasion even though under the applicable case law no actual physical invasion is necessary. The established case law looks to the effect of the governmental action, not the sole question of the "character of the invasion," when determining whether or not there has been an unconstitutional taking in violation of Fifth and Fourteenth Amendments or to establish a taking in the constitutional sense. This was the holding in a recent Florida case, *Pinellas County v. Austin,* 323 So.2d 6 (2d DCA 1975). In that case the defendant vacated a street, cutting off one of the plaintiffs' accesses to their property. The District Court of Appeals upheld the trial court's decision that the plaintiffs were entitled to be compensated for the losses suffered by the vacation of the street in question. This holding, that it is the *effect* upon the land in question caused by the governmental action, not a question of physical invasion, has been the repeated holding of the Supreme Court of the United States and that of the ma-

jority of the federal courts in determining whether or not there has been a taking in the constitutional sense.

Where *land use classifications* are exceptionally restrictive, for instance, as in *Brown v. Tahoe Regional Planning Agency*, 385 F.Supp. 1128 (D.Nev. 1973), there has been held to have been an unconstitutional taking for which the property owner was entitled to just compensation. In that case the court commented:

> . . .valid regulations may nevertheless constitute a taking of private property for public use entitling the owner to just compensation.
>
> *Brown v. Tahoe Regional Planning Agency, supra*, at 1132.

See, also, *United States v. Cress*, 243 U.S. 316 (1916).

Where the governmental action has resulted in the *blocking of egress and ingress*, there has been held to have been a taking in the constitutional sense. The case of *Stringer v. United States*, 471 F.2d 351 (5th Cir. 1973), involved the blockading by governmental authority of the plaintiff's only means of egress and ingress to his home. Although the court held that in this particular case there was no "taking" under the Fifth Amendment, it did so because the plaintiff had another remedy under the Tucker Act, and the court called that an " 'adequate provision' for compensation which the Fifth Amendment requires." *Stringer, supra*, at 383. See, also, *Pinellas County v. Austin, supra*, the Florida case mentioned above.

In the "airplaine cases", likewise, the courts have held that although there had been no physical invasion, where the plaintiff had been deprived of the beneficial use of its

property, there was indeed a taking in the constitutional sense. See *Griggs v. Allegheny County*, 369 U.S. 84 (1962), and *United States v. Causby*, 328 U.S. 256 (1946). In *Griggs, supra*, the court noted that although the airport was constructed for the use and the benefit of the public, the county had nevertheless "taken" the plaintiff's land, and the county was required to compensate the plaintiff for the loss of the beneficial use of his property. These cases are similar to the present case in that the sight and sound of the planes were objected to as an invasion just as the sight and sound of the comings and goings of some 12,000 prisoners per year is objected to in the present case.

Where there has been no physical invasion as a result of the *erection of a dam*, but the *effect* was to render the land *virtually useless*, as in *United States v. Cress, supra*, or where the effect has been to *lower the value of the property*, as in *Dugan v. Rank*, 372 U.S. 609 (1963), there has been held to be an unconstitutional taking for which the landowners were entitled to compensation. See, also, *United States v. Kansas City Life Insurance Company*, 339 U.S. 799 (1950) (R. 357-359).

Where the *effect of a railroad*, again where there was no physical invasion, caused special and peculiar damage to the plaintiff's property, the court in *Richards v. Washington Terminal Company*, 233 U.S. 546 (1914) held that there had been an unconstitutional taking.

Finally, another example of an unconstitutional taking without a physical invasion, perhaps more closely related to this Cause, are the cases where the *effect of zoning classification* has resulted in an unconstitutional taking without a physical invasion. A county or other political subdivision which enacts an arbitrary, unreasonable or

irrational zoning ordinance will be held to have "taken" unconstitutionally the property of an individual who is adversely affected despite the absence of any physical invasion of the property. See, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); and *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The courts again are looking *not* to the necessity of the physical taking but instead to the *effect* on the property involved. See, also, *Donohue Construction Company, Inc. v. Maryland-National Capital Park and Planning Commission*, 398 F.Supp. 21 (D. Md 1975).

A similar case recently decided was *M. J. Brock & Sons, Inc. v. City of Davis*, 401 F.Supp. 354 (N.D. Cal. 1975), in which the Court held that where the plaintiff landowners had alleged that the defendant city authorities had engaged in

> . . . a *series of acts*, including the limitation of present use of the property to agricultural uses, which have rendered the property substantially valueless so as to constitute an unlawful taking . . . (Emphasis added).
>
> *M. J. Brock & Sons, Inc. v. City of Davis, supra*, at 359.

a cause of action for this unconstitutional taking without a physical invasion had been alleged.

Thus, the parameter is broad wherein the courts have held that there have been unconstitutional takings without physical invasions. There can be no denial that a physical invasion is unnecessary. Consequently, it is the effect of the invasion, not its character which determines whether or not there has been an unconstitutional taking.

The determination as to precisely what effect constitutes a taking is made on a case by case basis. The court emphasized this in *United States v. Central Eureka Mining Co.*, 359 U.S. 155 (1958), which was a case involving governmental restriction in a situation similar to the case at hand. In that case the court commented:

> Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322. In doing so, we have recognized that action in the form of regulation *can so diminish the value of property as to constitute a taking*. E.g., United States v. Kansas City Life Ins. Co., 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277; United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206. (Emphasis Added).
>
> *United States v. Central Eureka, supra*, at 1104.

Thus where *the value of property is diminished*, an unconstitutional taking can have occurred. This is just what the evidence presented by the Petitioner proved happened to its land as a result of the County's erection of the jail and work-release facility in such close proximity to its property: that the value of the Petitioner's property had been severely diminished (JDA Vol. I 101-135); (JDA Vol. III 222-224); (JDA Vol. I 136-173); (JDA Vol. III 294-314) and that use of the property contemplated by the

Petitioner was totally thwarted by the conduct of the County (JDA Vol. III 22, 28, 45, 49, 54, 55, 58, 59, 65).

In *United States v. Cress, supra,* a dam constructed by the government resulted in the plaintiff's inability to use its mill wheel. The dam itself was not built on the plaintiff's property and hence there was no physical invasion. The effect, however, was to render the land virtually useless to the plaintiff. As the court in *Cress* commented:

> [The dam] had the necessary *effect* of raising the creek below the dam to such an extent as to destroy the power of the mill that was essential to the value of the land. (Emphasis added).
>
> *United States v. Cress, supra,* at 330.

The court held that although the government had the right to build the dam, it could not do so without compensating the landowner for the losses incurred. Likewise, even disregarding the question of the propriety of the erection of the jail, the County should not be allowed to effectuate that construction without, as in *Cress,* compensating the Petitioner landowner for the damages it has suffered. The erection of the jail and work-release facility, like the dam in *Cress,* precluded the Petitioner from utilizing the land in the manner which had been intended. The fact that the presence of the jail did not render the land wholly worthless is, as the case law amply shows, irrelevant to the question of the unconstitutional taking.

The effect upon the land of the plaintiff was again the concern of the court in *Dugan v. Rank, supra,* wherein the court commented:

Therefore, when the government acted here 'with the purpose and effect of subordinating' the respondents' water rights to the Project's uses 'whenever it saw fit,' 'with the result of depriving the owner of its profitable use, [there was] the imposition of such a servitude [as] would constitute an appropriation of property for which compensation should be made. Peabody v. United States, 231 U.S. 530, 538, 34 S.Ct. 159, 160, 58 L.Ed. 351 (1913); Portsmouth Co. v. United States, supra, 260 U.S. at 329, 43 S.Ct. at 136-137, 67 L.Ed. 287.

In an appropriate proceeding there would be a determination of not only the extent of such a servitude but the *value thereof based upon the differences between the value of respondents' property before and after the taking.* (Emphasis added).

Dugan, supra, at 625-626.

The opinion of the Circuit Court, upholding the decision of the District Court, impossibly narrow in light of the uncontroverted evidence presented, is a substantial departure from the established law and contradictory to it. The Court erred when it found there was *no effect* on FECP's property amounting to a taking in the constitutional sense and in concluding that there had been no deprivation of property in violation of the Fifth and Fourteenth Amendments.

In citing *Transportation Company v. Chicago,* 99 U.S. 635 (1878), a very old case in the long line of cases concerning the effect of the exercise of governmental powers on properties, the Circuit Court stated the law as it was in

1878, by quoting, "But acts done in the *proper exercise* of governmental powers, and not directly encroaching upon private property, though the consequences may impair its use, are universally held not be a taking within the meaning of the constitutional provision 9 U.S. at 642, 25 L.Ed. 336." (A. 15). Since this 1878 decision the Supreme Court and various other courts have expanded their opinions concerning the necessity of "a direct encroachment" upon private property and have found that it is the effect upon the property, not the necessity of an encroachment, which constitutes the determination of whether or not there has been a taking within the meaning of the constitutional provisions.

In addition, when citing those cases concerning the exercise of governmental powers, the Court disregarded the fact that the governmental powers are presumed to be those *properly* exercised. Where, as here, governmental action is improper, the reliance by the Circuit Court on opinions, whether old or new, on the effect of *proper* governmental action is misplaced. It was acknowledged that FECP's property was located in an area that was zoned for multiple family residential use and that the surrounding area was being used as a multiple family residential area. (JDA Vol. I 17-18). It was acknowledged, further, that the County's own zoning ordinance required that certain exceptions be taken prior to erecting any nonconforming use in the Interim Use area in which the jail and work-release facility was to be located. It was a stipulated fact that the "Defendant County failed to follow its own zoning ordinance requiring the exception to be secured". (JDA Vol. I 17-18). Nevertheless, the fact of this improper conduct on the part of the County was not taken into consideration. Had the County properly followed its own zoning ordinance FECP would have been apprised of

the situation and either would not have purchased the property or would have taken those steps necessary to prevent the location of the jail and work-release facility so close to its property, and then, only if successful, would have purchased the property. (JDA Vo. III 329). In that event FECP would have suffered no damages. Consequently, the Court's citation to *Chacon v. Granada*, 515 F.2d 922 (5th Cir. 1975), and *Louisville and Jefferson County Airport v. Porter, Kentucky*, 397 S.W.2d 146, (KY App. 1965), are misplaced, since those courts considered the effect of the *proper* exercise of governmental authority, i.e., urban renewal and the location of an airport. In those cases the *proper* exercise of governmental powers only served to cause a decline in the value of the respective land owners properties. In the case sub judice, however, the effect of the improper exercise of governmental authority in locating the jail work-release facility adjacent to FECP's property in contravention to County's own zoning ordinance served not only to diminish the value of the property but also to thwart the planned use of the property. This was apparent not only in the ultimate inability of FECP to market the property but in the immediate effect of the breakdown in contract negotiations and the withdrawal of an offer as a direct result of publication of the County's plan to locate the facility adjacent of FECP's property. (JDA Vol. III 176-191); (JDA Vol. III 280-292). With its attitude that a sovereign can do no wrong, the County thus far has accomplished this archaic and long ago disgarded proposition. Consequently, the Circuit Court in citing opinions from 1898 to 1947 as the basis for its decision is also relying on archaic law, long ago extended to prevent the kind of illegal conduct the County has accomplished in the case sub judice.

The unlawful erection of this jail work-release facility adjacent to FECP's property constitutes a nuisance. The uncontroverted evidence produced at trial was that there had been sixteen escapes from the facility between its opening in September 1974 and the time of trial, January 1975. At least one had been across the land of FECP. (JDA Vol. III 116-119); (JDA Vol. I 174-187). In the facility are housed prisoners charged with crimes of all nature. (JDA Vol I07-108). Roughly 12,000 prisoners pass through the facility per year. (JDA Vol. III 111). The sight and sound of comings and goings of various police vehicles is clearly obvious from the property owned by FECP. With 12,000 prisoners passing through the facility within 250 feet of FECP's property there is no possibility that there could be a factual finding that "nothing" about the appearance of the facility could indicate its use as a jail or a detention center. In addition, the pictures introduced clearly indicate that there are police cars parked in the lot and that the prisoners are clearly visible since they are permitted to roam about the grounds or fish in the lake on which property owned by FECP abuts. (App. Vol. I 13-46). Even more important is the fear generated by the location of a jail work-release facility, thereby preventing persons from purchasing property in close proximity to such a facility. (App. Vol. III 150-151). The County placed a right thing in a wrong place constituted the classic nuisance defined in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) wherein the court stated:

> [the] question of whether a particular thing is a nuisance is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the *circumstances* and the *locality*. . . . A nuisance may be merely a right thing in a wrong place,—like a pig in the parlor instead of a barnyard. (Emphasis Added).
>
> *Euclid, supra*, at 388.

Florida law defines a nuisance as *anything* which annoys or disturbs one in the free use, possession or enjoyment of his property or which renders its ordinary use of occupation physically uncomfortable. *Jones v. Trawick*, 75 So.2d 785 (Fla. 1954).

FECP is not merely disturbed in the free use possession or enjoyment of its property, it was deprived of the use for which it was purchased. Consequently, there also exists here the placing of a right thing in the wrong place, like the pig in the parlor. This was wrongful conduct by the County in erecting the jail and work-release facility in a residential area, which resulted in a nuisance to this property owner.

There is no question but that this taxpayer, by reason of the total deprivation of the use of its property, has sustained a burden greater than any other taxpayer in the county by reason of the wrongful erection of the jail work-release facility adjacent to its property. Consequently, under the guaranteed rights of the Fifth and Fourteenth Amendments to equal protection and due process of law this property owner, FECP, was taxed in a manner disproportionate to that tax enforced on other tax payers in the county. On several occasions the Supreme Court of the United States has held that a tax structure as applied to individual corporations may deprive that corporation of the equal protection of the laws of the United States in contravention to the Fifth and Fourteenth Amendments.

In *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 41 (1922) the court quoting from *Sunday Lake Iron Co. v. Wakefield TWP*, 247 U.S. 350 (1917) stated that:

> The purpose of the equal protection clause of the Fourteenth Amendment is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents*. (Emphasis Added).

Sioux City Bridge Co., supra, at 445.

Everyone in Dade County benefits from the North Dade Detention and Treatment Facility. One entity, FECP, however, is paying for this jail and work-release facility through the inability to use its property for the purpose it was acquired. The properties of the other citizens of Dade County are not similarly or comparably effected. In fact, the property value of the other citizens of Dade County is increased by Dade County's having adequate jail facilities. Therefore, an unequal burden which can be likened to a tax burden has been placed upon FECP's property.

The County has placed a right thing in a wrong place in total disregard of its own laws prohibiting this conduct. As a result of this improper exercise of governmental authority, the Petitioner's contemplated use of its property was prohibited. The effect of this illegal conduct by the Respondent County, under the auspices of the long ago discarded proposition "the sovereign can do no wrong" amounts to a taking of the Petitioner's property in violation of its rights under the Fifth and Fourteenth Amendments to the United States Constitution. Because of the effect of the Petitioner's property it also constitutes a nuisance and poses an inequitable burden on the Petitioner in violation of its right to equal protection. The sovereign did no wrong and that wrong should be corrected.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets the rulings of this Court concerning the improper exercise of governmental power which results in the destruction of the actual usefulness and value of a landowner's property. Either the decision below is in conflict with numerous decisions of this Court or issues of far reaching importance left undecided in those cases must be faced.

1. As we note below (*infra*, pp. 15-21), it is the *effect* of the exercise of governmental powers on the land owner, not the "character of the intrusion" as the lower court held, which determines whether there has been a taking in the constitutional sense.

2. Also noted below (*infra*, pp. 24-25), the evidence presented met the criteria established by this Court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) to establish a nuisance. The consideration of the circumstances and location of the jail, wrongfully erected in a residential area clearly show that the Respondent has created a nuisance. Consequently, the decision below is in conflict with *Euclid, supra.*

3. The Petitioner has suffered a burden unequal to other taxpayers in contravention to its rights guaranteed in the Fifteenth Amendment of the United States and in conflict to those cases cited, *infra*, pp. 25-26.

4. Finally, the proposition that "the Sovereign can do no wrong" was long ago put to rest. The decision below, allowing this improper conduct revives this possibility. Unless this Court reviews this decision, governments across the county will henceforth cite this decision as authority to disregard their own laws.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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Phillip E. Walker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 3 day of August, 1978, to: Stephen P. Lee, Assistant Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130.

By Phillip E. Walker
Phillip E. Walker